87 1099

No. 87 -

Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

PATRICK HANNEKEN,

Petitioner,

v.

DIXON DISTRIBUTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Felix Lascelles Callis

Pratt and Callis, P. C.
Route 111 at Airline Dr.
P. O. Box 179
East Alton, IL 62024
(618) 259-8011

Attorneys for Petitioner

November 24, 1987

QUESTIONS PRESENTED*

1. Does section 301 of the Labor Management Relations Act preempt a state law claim for retaliatory discharge such that the mere defense of preemption is sufficient to allow removal of the claim to Federal Court?

2. Does a state law claim for retaliatory discharge in Illinois arise under the workmen's compensation laws of that state thus barring it from removal under section 1445(c), Title 28, United States Code?

3. Does section 301 of the Labor-Management Relations Act preempt states from protecting employees against being discharged for seeking benefits under the state's workers compensation program, simply because the employee is a member

---

* All parties to the proceeding in the court below are listed in the caption. In the court of appeals, the case was consolidated with another case, Willoughby v. Illinois Central Light Company, No. 86-1973 (7th Cir.), solely for purposes of en banc argument. Cert. pending No. 87-417.

of a union that has negotiated a grievance and arbitration procedure for resolving disputes with the employer about the collective bargaining agreement?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....(i)

TABLE OF AUTHORITIES.....(iv)

OPINIONS BELOW.....2

JURISDICTION.....2

STATUTES INVOLVED.....2

STATEMENT.....5

A. Facts.....5

B. Proceedings Below.....8

REASON FOR GRANTING THE WRIT.....15

CONCLUSION.....26

TABLE OF AUTHORITIES

Cases: Page

Alexander v. Westinghouse Hittman Nuclear,
612 F.Supp. 1118 (N.D.Ill. 1985).....22

Allis-Chalmers Corp v. Lueck,
471 U.S. 202 (1985).....passim

Avco Corp v. Machinists,
390 U.S. 557 (1968).....18

Baldracchi v. Pratt & Whitney Aircraft Div.,
814 F.2d 102 (2d Cir. 1987), cert. pending,
No. 87-318.....15

Caterpillar v. Williams,
107 S.Ct. 2425 (1987).....12

Gonzalez v. Prestress Engineering Corp.,
115 Ill.2d 1, 503 N.E.2d 308 (1986).....13

Green v. Hajoca Corp.,
573 F.Supp. 1120 (E.D.Va. 1983).....22

Johnson v. Hussman Corp.,
805 F.2d 795 (8th Cir. 1986).....22

Lingle v. Norge,
823 F.2d 1031 (7th Cir. 1987), cert. pending
No. 87-259.....passim

Midgett v. Sackett-Chicago,
105 Ill.2d 143, 473 N.E.2d 1280 (1984)...9

Pan American World Airways v. Puchert,
472 U.S. 1001 (1985).....15

Roberts v. Citicorp Diners Club,
597 F.Supp. 311 (D.Md. 1984).....21

Thomas v. Kroger Co.,
583 F.Supp. 1031 (S.D.W.Va. 1984).....22

Willoughby v. Central Illinois Light Co., cert. pending No. 87-417.....11

Statutes: Page

28 U.S.C. § 1331.....2

28 U.S.C. § 1441(a),(b).....3

28 U.S.C. § 1445(c).....3

Illinois Workers Compensation Act, Ill. Rev. Stat., Chapter 48, Section 138.4(h).....4-5

Labor-Management Relations Act, 29 U.S.C. § 151 et seq.....4

Section 301(a), 29 U.S.C.. § 185(a).....4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-

PATRICK HANNEKEN,

Petitioner,

v.

DIXON DISTRIBUTING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Petitioner Patrick Hanneken petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the district court is unreported, and is set forth at pages A7 to A15 of the appendix to this petition (App. A7 to A15). The decision of the court of appeals, affirming the district court on the basis of Lingle v. Norge, 823 F.2d 1031 (7th Cir. 1987) (en banc), was designated as not for publication and is set forth at App. A1 to A2.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1987, and is set forth at A3-A4. This Court's order extending the time to file this petition was entered September 16, 1987. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1331 provides,

> The district courts shall have original jurisdiction of all civil actions arising

under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1441 provides, in pertinent part,

(a) Except as otherwise provided by an Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for th[at] district . . . .

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.

28 U.S.C. § 1445(c), provides,

> A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides,

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Ill. Rev. Stat. 1975, ch. 48 ¶ 138.4(h), provides,

> It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner

whatsoever in the exercise of the rights and remedies granted to him or her by th[e Workers Compensation] Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.

It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

STATEMENT

A. Facts.

On February 23, 1984, petitioner Patrick Hanneken suffered an injury to his right

shoulder in the course of his employment as a truck driver for the respondent Dixon Distributing company. On July 11, 1984, petitioner sustained a second injury to his right shoulder, also while in the course of his employment with respondent. Respondent's employees, including Hanneken, are represented in collective bargaining by Local 525 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and are covered by a collective bargaining agreement which guarantees workmen's compensation protection for all employees. Article 17. App. A21. This agreement also provides a grievance and arbitration procedure for the resolution of any controversy about the collective bargaining agreement. Article 14. App. A20.

On September 19, 1984, and on October 18, 1984, petitioner filed written claims with respondent regarding the shoulder injuries that he had suffered, thereby initiating the process

of seeking benefits under the Illinois Workers Compensation Act. On August 29, 1984, petitioner was released by the company doctor with lifting restrictions of 50 pounds. On December 7, 1984, petitioner's treating physician released petitioner to return to work without restrictions. On December 11, 1984, respondent wrote to petitioner recounting previous correspondence between parties and informing petitioner that he had been replaced and terminated.

The record below has not allowed for development of the facts of this case, but petitioner is prepared to prove that he received threats from respondent prior to his termination from employment. Petitioner contends that he was not returned to work following his doctor's release, since he had filed workers compensation claims and was ultimately terminated because respondent was following through on its threats to petitioner.

B. Proceedings Below

On September 30, 1985, petitioner filed an action in the Circuit Court of Illinois for Madison County, alleging that respondent had violated of the Illinois Workers Compensation Act, Ill.Rev.Stat. Chapter 48, ¶138.4(h), and furthermore, that respondent had violated the Public Policy of the State of Illinois. Petitioner's complaint sought compensatory and punitive damages, and it relied solely on the Illinois law of retaliatory discharge - that is, the complaint neither mentioned the collective bargaining agreement, nor stated a claim which, in order to prevail, would have required reference to that agreement.

On January 3, 1986, respondent filed a petition for removal in the United States District Court for the Southern District of Illinois, asserting that because petitioner was covered by a collective bargaining agreement, his claim under Illinois law was preempted by section 301 of the Labor-Management Relations

Act ("LMRA"), 28 U.S.C. §185, and that the district court had jurisdiction of the action under 28 U.S.C. § 1331 by virtue or respondent's preemption defense. On February 27, 1986, petitioner moved to remand the case to state court. On April 4, 1986, respondent moved to dismiss on preemption grounds.

On April 21, 1986, the district court ruled that removal was proper and the petitioner's claim is in reality one for violation of the collective bargaining agreement. App. A17.

The court recognized that in Midgett v. Sackett-Chicago, 105 Ill.2d 143, 473 N.E.2d 1280 (1984), the Illinois Supreme Court held that the state cause of action for retaliatory discharge should be extended to employees covered by a collective bargaining agreements, App. A8, but that the court failed to answer the preemption question. On these grounds the district court concluded that petitioner's reliance on Midgett was misplaced and that removal was proper. App. A9.

The district court then concluded that, on its facts, this was the type of claim which Congress intended to be governed by federal labor law. App. A10. Under this Court's decision in Allis v. Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), a state law claim is preempted if it involves a question of contract interpretation underlying a tort claim, regardless of whether the tort is defined as independent of the contract question. App. A11. The district court determined that Midgett and Lueck are "in irreconcilable conflict", App. A13, but it was a conflict the district court need not resolve. Relying on Vantine v. Elkhart Brass Manufacturing Company, 762 F.2d 511 (7th Cir. 1985), App. A12, the district court implied that petitioner's claim was federal in nature, even though not characterized as such by petitioner. Having decided that petitioner's claim was removable, the district court concluded that preemption applied because plaintiff's claim was in fact

for violation of a collective bargaining agreement. App. A17.

On appeal to the Seventh Circuit this case was consolidated for argument with Willoughby v. Central Illinois Light Company, No. 87-417, now pending on a petition for writ of certiorari before this Court.

After the case was argued on appeal, the Seventh Circuit issued an en banc decision on similar issues of preemption and removal. Lingle v. Norge, 823 F.2d 1031 (1987). In Lingle, the Court first decided that 28 U.S.C. § 1445(c), which forbids removal of claims arising under the workers compensation laws, was no barrier to removal because retaliatory discharge is a tort and not a workers compensation claim, id. at 1038-1039, and in any event the meaning of the statutory term "workers compensation laws" is itself a federal question, regardless of the label attached by the state. Id. at 1039. Moreover, because "the determination of whether the tort of retaliatory discharge arises

under federal law, and is therefore removable, is a federal question, . . . the plaintiff's retaliatory discharge claims arise under federal law, so the § 1445(c) does not bar removal." Id.

Next the court decided that, although the complaints did not invoke a collective bargaining agreement, any claim for retaliatory discharge brought by a worker covered by a collective bargaining agreement must necessarily state a claim under the agreement's "just cause" provisions, and thus is merely an "artful" attempt to evade federal jurisdiction. Id. at 1040. The court included a general reference to Caterpillar v. Williams, 107 S.Ct. 2425 (1987), in which this Court had held that 28 U.S.C. §§ 1331 and 1441 do not authorize defendants to remove to federal court employees' claims that they had been denied employment in contravention of a contract that was separate from the collective bargaining agreement. Despite the Seventh Circuit's passing references to

Caterpillar, 823 F.2d at 1037 and n. 7, 1040 n. 11, 1044, it made no effort to explain why, although a contract claim by workers covered by a collective bargaining agreement is not removable, a tort claim brought by such workers is removable.

Finally, the court of appeals decided that retaliatory discharge claims are, in fact, preempted by section 301 because they are inextricably intertwined with collectively-bargained just cause provisions. It recognized that the Illinois Supreme Court had both formulated a cause of action which does not depend on an interpretation of the collective bargaining agreement, and held that such claims are not preempted. Gonzalez v. Prestress Engineering Corp., 115 Ill.2d 1, 503 N.E.2d 308 (1986). Nevertheless, the Court asserted, a just cause provision necessarily extends at least as far as the retaliatory discharge cause of action. 823 F.2d 1044. Thus, in defining the state claim and deciding whether its

elements were satisfied, the courts are necessarily making determinations that could be made under the collective bargaining agreement, and federal labor policy requires those determinations to be made by arbitrators rather than courts. 823 F.2d at 1046.

Judge Ripple, in a dissent joined by Judge Cudahy, did not address the jurisdictional issues, but proceeded straight to the preemption issue. He focused on Allis-Chalmers, in which this Court decided that the state claims there were preempted, but also cautioned that preemption would not apply to "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 823 F.2d at 1052, quoting 471 U.S. at 212. Moreover, he pointed out that this Court had previously dismissed, for want of a substantial federal question, an appeal from a decision by the Hawaii Supreme Court that the Railway Labor Act did not preempt that state's retaliatory discharge cause of action. 823 F.2d at 1055

n. 5, citing Pan American World Airways v. Puchert, 472 U.S. 1001 (1985). Because retaliatory discharge claims neither depend on rights established by the contract, nor require reference to the contract, there is no basis for holding them to be preempted. 823 F.2d at 1055.

Immediately following the decision in Lingle, the court of appeals affirmed the district court's decision in this case on the basis of Lingle, and designated the opinion as not for publication. App. A1 to A2.

REASONS FOR GRANTING THE WRIT

Like Lingle v. Norge, pending on a petition for a writ of certiorari, No. 87-259, and Pratt & Whitney v. Baldracchi, pending here as No. 87-318, this case presents the question whether state retaliatory discharge claims are preempted, insofar as unionized employees are concerned, by section 301 of the LMRA. Like Baldracchi, but unlike Lingle, where the basis for removal was diversity of citizenship, this

case also presents questions of the propriety of removing this case to federal court solely on the basis that respondent's preemption defense makes the case one that arises under federal law, and whether removal of this claim, which is based on a state's worker's compensation laws, is forbidden by 28 U.S.C. § 1445(c).

1. Although the court below cited this Court's decision in Caterpillar v. Williams, 107 S.Ct. 2425 (1987), which had been decided only two weeks before the en banc decision in Lingle was issued, it disregarded the plainly contrary holding of Caterpillar, and made no attempt to explain why the preemption defense is sufficient to confer jurisdiction in this case, despite the fact that it was insufficient to do so in Caterpillar. This failure to follow the teaching of Caterpillar is the first basis for granting review.

In Caterpillar, several employees brought an action in state court, alleging that the company had breached a promise that had been

made to them, before they worked in the bargaining unit represented by their union. The promise was alleged to have been made completely separate from any collective bargaining agreement, and involved a commitment that if the facility at which they worked were ever closed, the company would provide other employment opportunities for them. After the employees were transferred into the bargaining unit, the company closed their plant and denied them other employment, and the employees sued in state court. The company removed to federal court on the theory that, when the employees entered the bargaining unit, any promises to them had been merged into the collective bargaining agreement, and that because the employee's only viable claim was under that agreement, the claims arose under federal law and were thus within the original jurisdiction of the federal courts under 28 U.S.C. § 1331.

This Court disagreed, concluding that a federal preemption defense does not convert a

claim under state law into one arising under federal law. It was true, the Court noted, that the plaintiffs might have chosen to assert rights under the collective bargaining agreement, but they had chosen to rely solely on rights found in a different contract. Not all contracts are merged into a collective bargaining agreement, and "a plaintiff is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied on is not a collective bargaining agreement." Id. at 2430-2431 (emphasis added).

This Court acknowledged its prior holdings that, because section 301 so completely preempts state laws which purport to govern the interpretation or application of a collective bargaining agreement is actually relying on federal law, even if he claims that he is relying on state law. Id. at 2430, citing Avco Corp. v. Machinists, 390 U.S. 557 (1968). But where the employee seeks to rely on a separate

source of rights, the "complete preemption" doctrine does not apply. Id. at 2432. Even if the employer wishes to argue that the creation or assertion of the independent rights was somehow barred by federal labor law, that defense must be raised in state court: "The 'artful pleading' doctrine cannot be invoked in such circumstances." Id.

The Seventh Circuit's jurisdictional determination in this case is directly contrary to Caterpillar. As in Caterpillar, petitioner here worked in a union shop but chose not to assert rights under his collective bargaining agreement, relying instead solely on his rights under Illinois tort law. Although respondent argues here, as did the employer in Caterpillar, that it acted for reasons expressly authorized by the collective bargaining agreement, or that the collective agreement precludes resort to a judicial forum, that is not a basis for removal. That defense must be litigated in state court, even if federal law were ultimately held to

supersede state law or state court procedures. Because, under Caterpillar, an employer cannot remove a case based on state law contract rights to federal court, but must litigate its preemption defense in the state court, a fortiori a case based on state tort rights cannot be removed by virtue of the assertion of a preemption defense. In neither situation does the existence of a preemption defense convert a state cause of action based on a source other than a collective bargaining agreement into a "claim arising under the . . . laws . . . of the United States" within 28 U.S.C. §1331, which is therefore removable under 28 U.S.C. §1441.

Although the Seventh Circuit took note of the decision in Caterpillar, it completely failed to take this Court's reasoning into account. Accordingly, the Court may wish to summarily reverse with instructions to the courts below to remand the case to the Illinois courts.

2. Petitioner does not contend that the second question presented - the effect of the anti-removal provision of 28 U.S.C. § 1445(c) - is independently worthy of review by this Court. However, if the Court decides to give plenary consideration to the preemption/removal question, it should consider the effect of section 1445(c) on removal of petitioner's retaliatory discharge claim, both in the interest of completeness, and because section 1445(c) provides an alternative basis for denying federal jurisdiction in this case.

Under section 1445(c), actions "arising under the workmen's compensation laws" of a state may not be removed to federal court even if they are otherwise properly removable. Every court outside the Seventh Circuit which has addressed the issue has held that claims for retaliatory discharge for having exercised rights under a state's workers compensation statute are nonremovable under 28 U.S.C. § 1445(c). Roberts v. Citicorp Diners Club, 597

F.Supp. 311, 314-315 (D.Md. 1984); Thomas v. Kroger Co., 583 F.Supp. 1031, 1036-1037 (S.D. W.Va. 1984); Green v. Hajoca Corp., 573 F.Supp. 1120 (E.D. Va. 1983). Accord, Alexander v. Westinghouse Hittman Nuclear, 612 F.Supp. 1118 (N.D. Ill. 1985). Cf. Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 107 (2d Cir. 1987), cert. pending, No. 87-318 (suggesting that section 1445(c) extends to protect state retaliatory discharge claims against preemption). But cf. Johnson v. Hussman Corp., 805 F.2d 795 (8th Cir. 1986) (upholding removal of workers compensation retaliatory discharge claim, without discussing section 1445(c)). Although most of these decisions were made in the district courts, they are the practical equivalent of court of appeals decisions for the purpose of Supreme Court Rule 17.1(a), because decisions to remand to the state courts are not appealable. 28 U.S.C. § 1447(c).

The court below held that retaliatory discharge claims are removable, both because in Illinois the claim is based on tort, rather than the workers compensation statute itself, and because, in any event, that state claim is preempted by federal labor law and so cannot be considered to have arisen under state workers compensation law. Neither reason is persuasive. First, section 1445(c) does not simply bar removal of claims arising under state workers compensation states, but under all "workmen's compensation laws," which obviously extends to the state common law. Particularly because Illinois has recognized the retaliatory discharge cause of action in order to further implement the objectives of its workers compensation laws, the Congressional objective of preventing employers from invoking federal jurisdiction to frustrate the enforcement of workers compensation laws requires that employees be permitted to choose a state forum for the litigation of these kinds of retaliatory discharge claims without fear of removal.

Nor does the availability of a federal preemption defense override the Congressional determination that an employee may choose where to litigate all elements and defenses to claims arising under a state's workers compensation laws. Barring removal would not frustrate the federal policy favoring arbitration, as the court below feared, 823 F.2d at 1039, because removal has no effect on the policy favoring arbitration; it only changes the court in which the federal policy is initially applied, subject to eventual review in this Court. The state and federal courts are equally able to decide whether a claim under the workers compensation laws has been superseded by section 301 in conjunction with a collective bargaining agreement or by that agreement's arbitration provisions. Congress decided in enacting section 1445(c) that the state courts are the primary adjudicators of claims and defenses under state workers compensation laws, and the fact that it may ultimately be determined that

the state law claim is preempted by federal law is no basis for disregarding Congress' will in section 1445(c).

3. The third question presented - whether state retaliatory discharge claims are preempted by section 301 - seeks review of a decision that is contrary to the holdings of several other circuits as well as to this Court's decisions in Allis-Chalmers Corp. v. Lueck, supra, and numerous other cases discussed in the certiorari petition in Lingle v. Norge, No. 87-259, at 8-13. See also Caterpillar v. Williams, 107 S.Ct. 2425, 2431-2432 and n.10 (1987) (reaffirming limiting language of Allis-Chalmers). Because of the Lingle petition states all of the arguments that petitioner would present here, we do not repeat those arguments now. See also Pratt & Whitney v. Baldracchi, No. 87-318.

Despite the importance of this question, petitioner does not ask the Court to set it down for plenary argument in this Court if the Court

grants review in Lingle, where it is the only question presented. If review is not granted in Lingle, however, the Court should grant review in this case on the preemption issue along with the two jurisdictional and removal issues presented.

CONCLUSION

The petition for a writ of certiorari should be granted, or the petition should be granted and the decision below summarily reversed for lack of subject matter jurisdiction, and remanded with instructions to remand to the state court.

Respectfully submitted,

Felix Lascelles Callis

Pratt and Callis, P. C.
Route 111 at Airline Dr.
P. O. Box 179
East Alton, IL 62024
Telephone: (618) 259-8011

Attorneys for Petitioner

November 24, 1987

APPENDIX

A1

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued December 12, 1986
June 29, 1987

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

PATRICK HANNEKEN, Plaintiff-Appellant, No. 86-1896 v. DIXON DISTRIBUTING COMPANY, an Illinois Corporation and ROBERT L. DIXON, Defendant-Appellees.	Appeal from the United States District Court for the Southern District of Illinois. No. 86 C 5006 William Beatty, Judge.
and	
GARY WILLOUGHBY, Plaintiff-Appellant, No. 86-1973 v. CENTRAL ILLINOIS LIGHT COMPANY, Defendant-Appellees.	Appeal from the United States District Court for the Central District of Illinois. No. 86 C 1002 Michael M. Mihm, Judge.

O R D E R

These two cases were consolidated for appeal. Both cases present the narrow issue of whether § 301 of the Labor Management Relations

Act, 29 U.S.C. §185(a) (1978), preempts the Illinois tort of retaliatory discharge. In Lingle v. Norge Division of Magic Chef, Inc., No. 85-2971 (7th Cir. June 23, 1987) (en banc), this court concluded that § 301 preempted the tort of retaliatory discharge.

In both Hanneken and Dixon Distributing, the district court found that the plaintiff's claim of retaliatory discharge was preempted. In light of Lingle, we affirm the judgments of the district courts.

AFFIRMED

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

Unpublished Order Not to be Cited per Circuit Rule 53.

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT of APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 29, 1987

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

No. 86-1896	
PATRICK HANNEKEN, Plaintiff-Appellant, vs. DIXON DISTRIBUTING COMPANY, an Illinois Corporation, and ROBERT L. DIXON, Defendant-Appellees.	Appeal from the United States District Court for the Southern District of Illinois Alton Division No. 86 C 5006 Judge William L. Beatty
---	
No. 8601973	
GARY WILLOUGHBY, Plaintiff-Appellant, vs. CENTRAL ILLINOIS LIGHT COMPANY, Defendant-Appellees.	Appeal from the United States District Court for the Central District of Illinois Peoria Division No. 86 C 1002 Judge Michael M. Mihm,

These cases were heard on the records from the United States District courts for the Southern District of Illinois, Alton Division, and Central District of Illinois, Peoria Division, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgments of

the said District Courts in these cases appealed from be, and the same are hereby AFFIRMED, with costs, in accordance with the order of this Court entered this date.

---

*Hon. Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

UNITED STATES DISTRICT COURT
Southern District of Illinois

PATRICK HANNEKEN,

JUDGMENT IN A CIVIL CASE

v.

DIXON DISTRIBUTING COMPANY and
ROBERT L. DIXON

CASE NUMBER: 86-5006

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__x__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendants, Dixon Distributing Company and Robert L. Dixon, and against the plaintiff, Patrick Hanneken.-------

May 15, 1986
Date

A. MARVIN HELART
Clerk

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

PATRICK HANNEKEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 86-5006
	)	
DIXON DISTRIBUTING CO. an Illinois Corporation, and ROBERT L. DIXON,	)	
	)	
Defendant.	)	

ORDER

This action coming on to be heard on motion of the Defendant, Dixon Distributing, Co., to dismiss said action with prejudice, due to notice having been given, and the Court having heard arguments of counsel, and due deliberation having been had,

IT IS HEREBY ORDERED, that the above-entitled action, be, and is hereby, dismissed with prejudice, and costs to Plaintiff.

Dated this 15th day of May, 1986.

_____

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

PATRICK HANNEKEN,	]	
	]	
Plaintiff,	]	
	]	
-vs-	]	No. 86 5006
	]	
DIXON DISTRIBUTING CO. and ROBERT DIXON, for Utilities of its Department.	]	
	]	
Defendant.	]	

ORDER

This cause, alleging the plaintiff was fired for exercising workman's compensation rights, was filed in state court and removed by defendant to this court on the grounds that the action was actually one within the federal jurisdiction by reason of Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. Now before the court is the motion of plaintiff to remand this cause to the state court, urging that this cause of action is one brought pursuant to the Illinois Workman's Compensation Act and that it is a cause of action brought pursuant to Midgett v. Sackett-Chicago, Inc., 473 N.E.2d 1280 (1985).

Initially, we may state that we feel plaintiff's memorandum objecting to removal and urging that the action is brought under the Illinois Workman's Compensation Statute, is without merit. The Illinois Supreme Court has ruled that a suit alleging retaliatory discharge for filing a workman's compensation claim "is properly brought in an independent tort action, not in a workman's compensation proceeding." Garrison v. Industrial Commission, 415 N.E.2d 352 (1980). However, plaintiff also urges, in objecting to removal, that Midgett v. Sackett-Chicago, supra, applies to the facts herein. Midgett involved a union member who filed a worker's compensation claim and the company retaliated by firing him. Without considering whether federal labor law would preempt the state law tort, the Illinois Supreme Court found that a union member should have a retaliatory discharge tort remedy, the same as a non-union member does. While the Illinois Supreme Court ruled that the tort remedy is available to a

union member, the court did not rule on whether the action would be preempted by Section 301. Plaintiff urges that this action does not fall within the jurisdiction of Section 301 and thus was improperly removed. We believe it was properly removed and that we have jurisdiction of the matter pursuant to Section 301, 29 U.S.C. Section 185.

Plaintiff, Patrick Hanneken, a beer truck driver salesman, sustained two work related injuries while working for Dixon Distributing Company. Shortly thereafter plaintiff filed two separate worker's compensation claims with the Illinois Industrial Commission and subsequently received awards for permanent, partial disability. Plaintiff is a member of the Teamster, Chauffeurs and Helpers Local Union No. 525, which is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Defendant Dixon Distributing Company and Local 525 are parties to a collective bargaining agreement.

The collective bargaining agreement further provides that the employer shall not discharge an employee without just cause.

On October 2, 1985, plaintiff filed suit against defendant in the Circuit Court of Madison County, Illinois alleging that defendant discharged him in retaliation for filing worker's compensation claims. Plaintiff allegedly by-passed the grievance procedures established in the collective bargaining agreement. On January 6, 1986, Dixon Distributing Company removed the case to this court, urging that federal courts have jurisdiction pursuant to Section 301 of the Labor Management Relations Act, which preemptively requires use of the grievance procedure before filing suit.

We believe this is precisely the kind of claim which Congress intended that the uniform federal labor law govern. The Supreme Court stated in Allis Chalmers Corporation v. Lueck, 105 S.Ct. 1904 (1985) that:

> These questions of contract interpretation, thereby, underlie any finding of tort liability, regardless of the fact that the state court may choose to define the tort as 'independent' of any contract question. Congress has mandated that federal law govern the meaning given contract terms. Since the state court purports to give life to these terms in a different environment, 'it is preempted.' 105 S.Ct. at 1950

While Lueck involved contract interpretation over bargained for disability insurance, the court strongly implied that the holding would be applied wherever contract interpretation was necessary.

> Since nearly any alleged wilful breach of contract can be restated as a tort claim for breach of a good faith obligation under a contract, the

arbitrator's role in ever case could be by-passed easily if Section 301 is not understood to preempt such claims. Claims involving vacation or overtime pay, work assignments, unfair discharge (emphasis added)--in short, the whole range of disputes traditionally resolved through arbitration--could be brought in the first instance in the state court by a complaint in tort rather than in contract. A rule that permitted an individual to side-step available grievance procedures would cause arbitration to lose most of its effectiveness. Republic Steel Corporation v. Maddox, 85 S.Ct. 614 (1965) as well as eviserate a central tenent of federal labor contract law under Section 301 that it is the arbitrator, not the court, who has the

responsibility to interpret the labor contract in the first instance. 105 S.Ct. at 1915, 1916.

While it might be that the holding of Midgett v. Sackett-Chicago, supra by the Illinois Supreme Court and the holding of Allis Chalmers Corporation v. Lueck, supra by the Supreme Court of the United States are in irreconcilable conflict, we do not believe that conflict is one we must now resolve. This court believes itself bound to follow the federal law as set fort in Lueck. The Seventh Circuit, in Vantine v. Elkhart Brass Manufacturing Company, 762 F.2d 511 (7th Cir. (1985), stated that:

> Furthermore because, an allegation of discharge in retaliation for filing a worker's comp claim is an allegation of a breach of the collective bargaining agreement, it arises under Section 301 of the Labor Management Relations Act rather than the Indiana

> Workmen's Compensation Act. See Allis-Chalmers Corporation v. Lueck, 105 S.Ct. 1904 (1985). Section 301 of the Act confers jurisdiction upon federal courts in cases involving breaches of collective bargaining agreements. 29 U.S.C. Section 185(a) (citation omitted). Removal of an action from a state court to a federal court is proper where the real nature of the claim asserted is federal, whether or not so characterized by the plaintiff. (citation omitted). Vantine, 762 F.2d at 517-518.

Admittedly, Indiana law had no such holding as Midgett, having only the retaliatory discharge action for an employee at will pursuant to Framption v. Central Indiana Gas Company, 260 Ind. 249 (1973). However, we believe the language of Lueck leaves little doubt that federal law at this time would hold that the state court action is preempted by Section 301.

In Eitmann v. New Orleans Public Service, Inc., 730 F.2d 359 (5th Cir. 1984) the court examined whether a state court wrongful discharge claim was properly removed to federal court. In deciding that the cause of action was properly removed even thought the complaint did not invoke Section 301 jurisdiction, the court analyzed the preemption doctrine as it was applied in the context of a Section 301 action and of an ERISA preempted state action. The court stated:

> In Avco Corporation v. Aero Lodge No. 735, supra, the Supreme Court considered whether a state law claim that was preempted by Section 301 could properly be removed to federal court where the plaintiff had not invoked Section 301 on the face of the complaint. In deciding that Section 301's preemptive effect provided 'arising under' jurisdiction under Section 1337, the court held that it

was clear that the collective bargaining agreement claim at issue was 'one arising under the laws of the United States within the meaning of the removal statute.' 88 S.Ct. at 1237. Moreover, the franchise tax board court, in distinguishing the case before it--which involved the propriety of removing an ERISA preempted state claim--from Avco noted:

> The necessary ground of decision (in Avco) was that the preemptive force of Section 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is clearly a creature of the federal law, notwithstanding the fact that state law would provide a cause of

> action in the absence of Section 301. Avco stands for the proposition that if a federal cause of action completely preempts a state cause of action and a complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law. 103 S.Ct. at 2853-54.

We therefore hold that removal of this action which purports to be a state retaliatory discharge action was proper because the claim is in reality one for violation of the collective bargaining agreement. Accordingly, the motion for remand must be denied.

IT IS SO ORDERED

DATED: This 21st day of April, 1986.

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

NOTE: CLERK TO FORWARD COPIES TO ALL PARTIES.

A18

(EXCERPTS FROM:)

MASTER BEER AND/OR LIQUOR AGREEMENT

and

ADDENDA

by and between

DIXON DISTRIBUTING CO.
GODFREY, ILLINOIS

and

TEAMSTERS, CHAUFFEURS & HELPERS
LOCAL UNION NO. 525
ALTON, ILLINOIS

For the Period of

JANUARY 4, 1984 TO JANUARY 3, 1987

ARTICLE II

DISCHARGE OR SUSPENSION

The employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give a least one (1) warning notice of complaint against such employee to the employee, in writing and a copy of the same to the Union and job steward affected, except that no warning notice need be given to an employee, the Union or the job steward before he is discharged if the cause of such discharge is dishonesty, or

drunkenness or recklessness resulting in monetary damage. The warning notice as herein provided shall not remain in effect for a period of more than one (1) year from the date of said warning notice.

Discharge must be by proper written notice to the employee and the Union affected. Any employee may require an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee, he shall be reinstated. The Local Union and the Employer shall have the authority to order full, partial or no compensation for time lost. Appeal from Discharge, suspension or warning notice must be taken within (10) days by written notice and a decision reached within thirty (30) days from the date of discharge, suspension or warning notice.

ARTICLE 14

GRIEVANCE MACHINERY

The Union and the Employer agree that there shall be no strike, lock-out, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in the Agreement, of any controversy which might arise. Grievances shall first be taken up between the employer and the Local Union involved, provided, however, that all grievances must be made known in writing to the other party within (30) thirty days, unless otherwise mutually agreed to, after the reason for such grievance has occurred, or after the first date upon which the grievant should have become aware of the existence of such grievance, whichever is later except that such thirty (30) day time limitation shall not apply in those instances in which the Employer and an employee shall have agreed to a condition of employment contrary to that which is set forth in this Agreement. A duly authorized representative of the Employer

or the Union must make a written disposition of the matter within ten (10) calendar days after submission of such written grievance.

On failure of the Employer and the Local Union to resolve the grievance, either party may file the grievance with the Joint Committee. The case shall be placed on the calendar to be heard at the next meeting of the Joint Committee, in accordance with its rules and procedure.

ARTICLE 17

COMPENSATION CLAIMS

The Employer agrees to cooperate toward the prompt settlement of the employee on-the-job injury claims when such claims are due and owing. The Employer shall provide Workmen's Compensation protection for all employees even though not required by State Law.

87-1099

Supreme Court, U.S.
FILED
JAN 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PATRICK HANNEKEN,
Petitioner,

vs.

DIXON DISTRIBUTING COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN DALE STOBBS
STOBBS AND SINCLAIR
500 Bond Street
P. O. Box 336
Alton, Illinois 62002
(618) 465-6978
Attorneys for Respondent

January 12, 1988

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Section 301 of the Labor Management Relations Act is of special preemptive force so as to confer Federal Court original and removal jurisdiction in disputes involving employee discharges, where a collective bargaining agreement exists that contains "just cause" termination, grievance and binding arbitration award clauses.

2. Whether a state tort remedy for retaliatory discharge authorizing a jury award of punitive damages is specially preempted, where a collective bargaining agreement between the employee's collective bargaining agent and the employer, contains "just cause" termination, grievance and binding arbitration award clauses, because the state tort action necessarily is inextricably intertwined with consideration of the terms of the collective bargaining agreement.

3. Whether an employee who sustains a work related permanent partial disability for which he receives compensation, but which renders him physically unable to do his former job, and who is replaced by another union worker, may ignore the grievance and arbitration clauses of his collective bargaining agreement and maintain a state court suit for claimed discharge in retaliation for filing a Workers' Compensation claim.

---

* This case was consolidated with *Willoughby v. Illinois Central Light Company,* No. 86-1973 (7th Cir.), for the purposes of oral argument. It was not, as Petitioner states in his Brief, consolidated for purposes of en banc argument.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Statement	2
A. Facts	2
B. Proceedings Below	5
Reasons For Not Granting The Writ	11
Conclusion	19

TABLE OF AUTHORITIES

Page

Cases:

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) 7

Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, et al., 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) 7

Baldracchi v. Pratt & Whitney Aircraft Division, United Technologies Corporation, 814 F.2d 102 (2d Cir. 1987) 17

Caterpillar, Inc. v. Williams, ____ U.S. ____, 107 S.Ct. 2425 (1987) 9

Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, et al., 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) 7

Gonzalez v. Prestress Engineering Corp., 115 Ill. 2d 1, 503 N.E.2d 308, 104 Ill. Dec. 751 (1986) 8

Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120 (3rd Cir. 1986) 17

Johnson v. Hussmann Corp., 805 F.2d 795 (8th Cir. 1986) 17

Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978) 8

Leu v. Norfolk & Western Railroad Co., 820 F.2d 825, (7th Cir. 1987) 15

Lingle v. Norge Division of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987) 8

Midgett v. Sackett-Chicago, Inc., 104 Ill. 2d 143, 473 N.E.2d 1280, 85 Ill. Dec. 475 (1984) cert denied 474 U.S. 909, 106 S.Ct. 278, 88 L.Ed. 2d 243 (1985) ... 8

Peabody Galion v. A. V. Dollar, et al., 666 F.2d 1309 (10th Cir. 1981) 17

Statutes:

28 U.S.C. Sec. 1445(c) 7

Section 301(a), 29 U.S.C. Sec. 185(a) 7

48 Ill. Rev. Stat. 1975, Sec. 138.4(h) 16

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PATRICK HANNEKEN,
Petitioner,

vs.

DIXON DISTRIBUTING COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Dixon Distributing Company opposes the Petition for a grant of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinions below are correctly cited and reported in the Petition and Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional statement is correctly set out in the Petition for Writ of Certiorari.

---

* Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, Respondent, Dixon Distributing Company states that it has no parent, subsidiary or affiliate companies.

STATUTES INVOLVED

The statutes involved are correctly reflected in the Petition for Writ of Certiorari.

STATEMENT

The Statement of Facts and Proceedings Below contained in the Petition for Writ of Certiorari are in several significant places incomplete, obscured or misstated. Dixon Distributing Company (Dixon), therefore, submits an independent Statement of Facts and of Proceedings Below.

A. Facts.

The facts are established by Mr. Hanneken's admissions to the Employer-Respondent's Request for Admission of Facts and Genuineness of Documents, which were not the subject of a timely response or objection and, therefore, are deemed admitted, and by the pleadings in this case.

Dixon Distribution Company is a party to a collective bargaining agreement with the Teamsters, Chauffeurs, and Helpers Local Union No. 525, Alton, Illinois, which agreement covered the period relevant to the considered dispute. Patrick Hanneken is a member of the bargaining unit and worked as a driver-salesman for Dixon. Dixon is a distributor of Anheuser-Busch and related products. The agreement provides in pertinent part:

> "**Article 11. Discharge or Suspension.**
>
> The employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of complaint against such employee to the employee in writing and with a copy of same to the union and job steward affected, except that no warning notice need be given to an employee, the union or job steward before he is discharged if the

cause of such discharge is dishonesty, or drunkenness or recklessness resulting in monetary damage. The warning notice shall not remain in effect for a period of more than one (1) year from date of said warning notice.

Discharge must be by proper written notice to the employee and union affected. *Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee, he shall be reinstated. The local union and the employee shall have the authority to order full, partial or no compensation for time lost.* Appeal from discharge, suspension or warning notice must be taken within ten (10) days by written notice and decision reached within thirty (30) days from the date of discharge, suspension or warning notice."

• • •

"**Article 14. Grievance Machinery.**

The union and the employer agree that there shall be no strike, lock-out, tie-up, *or legal proceedings* without first using all possible means of a settlement, as provided for in this agreement, of any controversy which might arise. Grievances shall first be taken up between the employer and the local union involved, provided, however, that all grievances must be made known in writing by the other party within thirty (30) days, unless otherwise mutually agreed to, after their reason for such grievance has occurred, or after the first date upon which the grievant should have become aware of the existence of such grievance, whichever is later except that such thirty (30) day time limitation shall not apply in those instances in which the employer and an employee shall have agreed to a condition of employment contrary to that which is set forth in this agreement. A duly authorized representative of the employer or the union must make a written disposition of

> the matter within ten (10) calendar days after submission of such written grievance." [Emphasis supplied]

Upon failure of the employer and union to resolve the grievance, an appeal procedure is provided for appeal to a joint committee. A majority vote of the joint committee finally settles the grievance.

The collective bargaining agreement provides in Article 17 that:

> ". . . the employer agrees to cooperate toward the prompt settlement of employee on-the-job injury claims when such claims are due and owing."

The employer further agrees to carry workers' compensation insurance to pay job injury claims.

On February 23, 1984, Patrick Hanneken sustained an injury to his right arm while dropping beer barrels from a truck and while working for Dixon Distributing Company. He filed a claim for his injury with the Illinois Industrial Commission and later settled his claim for an amount that included an award for permanent partial disability.

On July 11, 1984, Mr. Hanneken, who had returned to work after the first injury, sustained another injury, this time to his low back and right shoulder while lifting pallets and while working for Dixon. He filed an application for adjustment of this injury claim with the Illinois Industrial Commission. Mr. Hanneken settled this claim for an amount that included an award for permanent partial disability.

On August 29, 1984, while Mr. Hanneken was off work as a result of the second injury and while he was receiving temporary total disability, he was examined by a Doctor Walters for his low back and right shoulder injuries. Doctor Walters was an evaluating physician, although the Petition for Certiorari refers to him as the "company doctor." Doctor Walter's report, based

on the subjective complaints of Mr. Hanneken of that date, states, inter alia,:

> "He is anxious to return to work with an indefinite restriction of not lifting over fifty pounds and I have given him a note to that effect."

On September 6, 1984, Mr. Hanneken informed Dixon he would never be able to lift over fifty pounds in weight for the rest of his life and asked for a "light duty" job. He was informed there was no "light duty" job available, and that all jobs required the lifting of barrels of beer, manipulating beer cases, or lifting other objects in excess of fifty pounds.

On September 19, 1984, Mr. Hanneken wrote Dixon asking for his accumulated sick pay and vacation pay. On September 20, 1984 a check for these items in the amount of $3,185.28 was forwarded to him. An employee does not receive accumulated vacation and sick pay unless he is terminating his employment permanently.

Mr. Hanneken applied for unemployment benefits. According to his Petition for Certiorari, he filed claims for permanent partial disability under the Illinois Workers' Compsensation law on September 19, 1984 and October 18, 1984.

Dixon hired a union replacement to fill Mr. Hanneken's job. Thereafter, Mr. Hanneken obtained an unrestricted work release from another doctor, denominated in the Petition for Certiorari as the "treating physician," but he was informed that his old job had been filled.

B. Proceedings Below

After settling his workers' compensation claims, Petitioner on October 2, 1985, filed the present Complaint for "retaliatory discharge" in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, seeking, inter alia, job reinstatement, compensatory and punitive damages. Mr. Hanneken did not at

any time file a grievance or request an investigation of his job termination, or otherwise seek the remedies available under the collective bargaining agreement, so as to arbitrate his "discharge." We have carefully searched the Complaint and find no allegation of employer "threats," such as are asserted in the Petition for Certiorari and conclude they are unsubstantiated assertions de hors the record. The Complaint did not refer to the existence of the collective bargaining agreement or its coverage of "discharge" disputes.

Dixon requested the Admission of Facts and Genuineness of Documents to establish the existence of the preemptive federal question. Meanwhile, on Motion of Petitioner, the State Court Judge dismissed Dixon's Affirmative Defenses, which alleged a failure to follow the grievance procedures of the collective bargaining agreement and a bar of the action by reason of the settlement of the workers' compensation claims. Upon expiration of the time allowed to respond to the Request for Admission of Facts and Genuineness of Documents, which establish the collective bargaining agreement and the federal preemptive question, this case was removed to the United States District Court for the Southern District of Illinois. No issue of timeliness of removal is raised in the Petitioner's Motion to Remand.

The Motion to Remand was denied and the Respondent's Motion to Dismiss the Complaint was granted. The Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. The appeal was denied on June 29, 1987. Petitioner now seeks review in this Court by Petition for Writ of Certiorari. That Petition correctly reflects the various dates stated therein, so far as Respondent is presently aware.

The District court, when dismissing the Complaint, held:

> ". . . This is precisely the kind of claim Congress intended that the uniform federal labor law govern."

The District Court relied on this Court's holding in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) and found the need for uniform federal law in discharge cases covered by a collective bargaining agreement under Section 301 of the Labor Management Relations Act. It further held that regardless of how a state court might label its retaliatory discharge remedy as "contract" or as a "tort" in which the duty arises because of the collective bargaining agreement "just cause" clause, or a duty created by a state statute relating to "unjust discharge" for filing a workers' compensation job injury claim, it was still a dispute covered by the discharge provisions of the collective bargaining agreement, which requires interpretation, application and compliance with that agreement. The "justness" of the discharge is, thus, a matter of preemptive federal law. The person aggrieved must comply with the dispute resolution procedures of the agreement, bebore he can file suit in court.

The District Court relied on *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, et al.,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) and *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, et al.,* 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) for the proposition that the preemptive force of Section 301 of the Labor Management Relations Act is so great as to make removal to a federal court proper, even though Section 301 is not referred to on the face of the Complaint. The District Court held the claim was "in reality one for violation of the collective bargaining agreement."

Petitioner did not raise in the United States District Court or in the United States Circuit Court of Appeals for the Seventh Circuit, the contention first raised in his Petitioner to this Court, namely, that 28 U.S.C. Sec. 1145(c) bars removal because Petitioner is bringing a claim "arising" under the workers' compensation laws of the State of Illinois. Hence, the District Court

and the Court of Appeals did not have the current contention before them for decision. Petitioner's contention in this regard is, however, disposed of adequately and adversely to him in the Seventh Circuit's holding in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987) at pages 1038 and 1039.

On June 29, 1987, the Circuit Court of Appeals for the Seventh Circuit, after taking Briefs and Oral Arguments, affirmed dismissal of the Complaint on the basis of its en banc decision of June 23, 1987 in *Lingle v. Norge Division of Magic Chef, Inc.*, (85-2971). The Court held the claims under Illinois tort law for retaliatory discharge, where the employee and employer are covered by a collective bargaining agreement having "just cause," grievance and arbitration procedures, are preempted by Section 301 of the Labor Management Relations Act.

The court in *Lingle* analyzed Illinois law creating the tort of retaliatory discharge, as a means of enforcing a provision of the workers' compensation law, which annunciated the public policy of the state. [See: *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978); *Midgett v. Sackett-Chicago, Inc.*, 104 Ill. 2d 143, 473 N.E.2d 1280, 85 Ill. Dec. 475, (1984) cert denied 474 U.S. 909, 106 S.Ct. 278, 88 L.Ed.2d 243 (1985); *Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N.E.2d 308, 104 Ill. Dec. 751 (1986)]. The Seventh Circuit concluded that regardless of the label affixed to the cause of action by Illinois Courts, it was at heart a claim for "unjust" discharge and was covered by the collective bargaining agreement. The court declined to be governed by the Illinois Supreme Court's contemporaneous holding in *Gonzalez* that the tort claim for retaliatory discharge was not preempted by Section 301 of the Labor Management Act. The *Lingle* court favored the view of Justice Ryan in dissent, when he wrote that the question of federal preemptive jurisdiction was controlled by federal, not state, decisions, so that the state courts had no

authority to determine whether the collective bargaining agreement "just cause" discharge provision includes a "retaliatory discharge" claim.

The *Lingle* court further held the claim of federal preemption was governed by this Court's decision in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). *Allis-Chalmers* holds a state tort for breach of a fiduciary duty of good faith and fair dealing by an insurance company providing disability insurance to an employee under a collective bargaining agreement requiring the provision of such insurance, is preempted by Section 301 of the Labor Management Relations Act, because the collective bargaining agreement provides procedures for adjusting disputes regarding the handling of claims; because of the particular force of preemption intended by Congress when enacting Section 301, and because of the policy need to have uniform federal decisional law in this area of employer-employee disputes.

Lingle also held federal preemption jurisdiction could not be defeated by "artful" pleading in simply failing to reference the existence of the collective bargaining agreement on the face of the Complaint. The expressed intent of the Labor Management Relations Act and the construction given to it by the court, requiring a uniform body of federal decisions, overrode state policy decisions in the same area affecting employment or discharge disputes. Neither is the existence of the possibility of punitive damages a reason to defeat federal preemption in this basic area of management-labor relations.

Finally, *Lingle* distinguished the holding of this Court in *Caterpillar, Inc. v. Williams,* ____ U.S. ____, 107 S.Ct. 2425 (1987) where multiple, independent contracts were allegedly created regarding the provision of employment in the event of plant closing or movement, because the independent agreements were made when the plaintiffs were not even members of a collective bargaining unit and no provisions of a collective bargain-

ing agreement were involved. Hence, the pure contract action for declaratory relief was not federally preempted in *Caterpillar,* because Section 301 was not involved. However, where the retaliatory discharge "tort" claim is a mask for what is really a "just cause" termination claim covered by a collective bargaining agreement, the claim is preempted.

REASONS FOR NOT GRANTING THE WRIT

A. The Decision Is Mandated By This Court's Holding In Allis-Chalmers Corp. V. Leuck.

There is no reason to grant review of the decision in this case, because the decision of this Court in *Allis-Chalmers,* supra, clearly mandates the result reached, in that it squarely holds state "tort" remedies involving interpretation of discharge provisions of the collective bargaining agreement are fully preempted by Section 301 of the Labor Management Relations Act. Where the collective bargaining agreement provides grievance procedures for disputes arising from matters covered by the agreement, those procedures must be utilized to the exclusion of independent remedies. Industrial peace, the good of the whole, the policy of Congress and the employer's reasonable economic expectations at the time he enters the collective bargaining agreement, operate to preclude independent actions for punitive damages outside the framework of the collective bargaining agreement. Substantive principles of federal law must be paramount in suits of a kind covered by Section 301, so as to have a uniform labor policy. Almost any suit for breach of contract in employment can be fashioned into a "tort" claim for wrongful discharge, breach of fiduciary duty or the like. Denomination of such claims as "tort," rather than "contract" actions, seldom changes the basic character of such claims as disputes arising under some provision of the employment agreement. Whether the claim is for the "tort" of breach of good faith in processing insurance disability claims is preempted by the collective bargaining agreement covering the provision of such insurance and providing a grievance procedure, or whether a "tort" for wrongful or retaliatory discharge, also covered by the collective bargaining agreement "just cause" termination, grievance, arbitration and provision of workers' compensation insurance clauses, the result should be the same because the principles applied are the same. The need for uniformity and predictability require federal interpretation.

The congressional policy to foster employer work agreements with the workers' collective bargaining unit and to resolve disputes by arbitration, and not by resort to individual "tort" actions, is nowhere more apparent than here. Individual actions which ignore the collective bargaining agreement and the union, undermine the congressional purpose to foster and preserve the rights of both management and labor through collective bargaining action really demean the union's representative capactity.

The retaliatory discharge torts are common law actions fashioned as a matter of policy by the state courts to enforce state policies that discharges not be "unjust." They are perceived to be "unjust," where they are made in retaliation for conduct protected by the state, such as filing a claim for a job related injury. State common law policy considerations in fashioning such torts, however, must give way to the higher congressional policy to require federal jurisdiction where the dispute is, at heart, one covered by a collective bargaining agreement, which, in turn, is one of the centerpieces of federal labor law.

The states, under *Allis-Chalmers,* supra, still have some regulatory authority of labor management relations, but where state rules would allow circumvention of dispute mechanisms collectively bargained, and where the disputes are at the very heart of such agreements, such as, hiring, discharge, suspension, wages, hours of work, working conditions and the like, the powerful preemptive force of Section 301 is superior to state rules and must override them. Accord: *Franchise Tax Board of California, v. Construction Laborers Vacation Trust for Southern California, et al.,* 463 U.S. 1, 23, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), where the court stated in discussing its holding in *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, et al.,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968):

> ". . . 'The preemptive force of Section 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and labor organization. Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of Section 301."

The instant case so clearly falls under these precepts; the "vindication" of Petitioner's "discharge" so necessarily turns on a consideration of the "justness" of such discharge under the collective bargaining agreement, that no further review is necessary here. Petitioner merely wants a second appeal. He is not entitled to a second appeal, because the law is clear that he cannot ignore the collective bargaining grievance machinery, as he did, in order to file a tort claim for punitive damages in the state court.

B. Petitioner Has Waived Any Claim To Assert 28 U.S.C. Section 1445(c) As The Basis For Depriving The District Court Of Federal Removal Jurisdiction.

Petitioner's 28 U.S.C. Section 1445(c) claim is insufficient to warrant independent review of the decision of the Circuit Court of Appeals by this Court. Petitioner acknowledges in his Petition that this Section is not alone a sufficient basis to cause this Court to review the Circuit Court of Appeal's decision . Respondent suggests Section 1445(c) is not even properly before this Court, since it was never raised by Petitioner as a bar to federal jurisdiction in either the District Court or the Court of Appeals. Hence, it must be deemed waived, unless some principle of relief on matters de novo is to be inaugurated for this Court.

Even more, Section 1445(c), which denies removal of cases arising under the workers' compensation laws of a state does not apply, as noted by the court in *Lingle,* supra. First, the preemptive force of Section 301 of the Labor Management Relations Act confers original federal court jurisdiction where a

collective bargaining agreement exists pursuant to the provisions of that act. Hence, the suit does not arise under the workers' compensation laws of Illinois. Moreover, in the case at bar, to the extent that workers' compensation is involved in Petitioner's claim, he has received, and admits he has received, his full benefits thereunder for both temporary total and permanent partial disability. The admitted facts show he is, because of permanent partial disability, unable to do his former job, which includes lifting barrels weighing more than fifty pounds. The admitted facts are that the man wanted a "light" job and none existed. He "cashed out" his benefits and, when he had them paid, he retaliated with this suit for punitive damages and ignored his collective bargaining agent, the union, and the provisions of the collective bargaining agreement. As noted by *Lingle,* the Illinois courts hold the retaliatory discharge action as a common law action that does not arise under the Workers' Compensation Act. Hence, Section 1445(c) is inapplicable.

Finally, the court in *Lingle* correctly perceived that the interpretation of whether the claim "arises" under the workers' compensation laws of the state is a matter for federal interpretation, not state court interpretation. Under the federal interpretations applicable, Section 1445(c) is not involved.

C. Federal Preemption Under Section 301 Is Not A Matter For State Court Determination.

Petitioner suggests the federal court does not have jurisdiction of the issues in this case, because the preemption question could be raised as a matter of affirmative defense to the state court action and removal cannot be had where the federal question is raised as a matter of defense. In the first place, such argument ignores the decisions of this Court in *Avco Corp.*, supra, and *Franchise Tax Board of California*, supra, that Section 301 preemption is of such powerful force that in a case where it applies, the well pleaded complaint concept, which complaint omits reference to applicable federal jurisdiction,

does not exist. State laws, regulations and tort remedies that conflict or attempt to replace or supplant the federal laws simply do not apply and federal jurisdiction controls regardless of how the original complaint may be framed. *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, et al.*, 390 U.S. 557, 560, 88 S. Ct. 1235, 20 L.Ed.2d 126 (1968); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 1909, 85 L.Ed.2d 206 (1985); *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, et al.*, 463 U.S. 1, 23, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Caterpillar, Inc. v. Williams*, ____ U.S. ____, 107 S.Ct. 2425, 2429 (1987). With reference to *Caterpillar,* it is expressly noted that the federal preemptive jurisdiction for Section 301, as annunciated in *Avco Corp.*, supra, is reaffirmed. Thus, *Caterpillar* expressly preserves the federal preemptive jurisdiction of Section 301 where a collective bargaining agreement is involved. It is authority in favor of Respondent's position, not, as Petitioner would have it, authority adverse to the holdings in *Lingle. Caterpillar* and *Lingle* are one on the concept of preemptive jurisdiction.

Even if the "well pleaded complaint" rule were applicable, which it is not, in this case, there exists the well recognized exception to that rule, which is the "artful pleading" rule, namely, a party cannot, by disguising a claim arising under a federal right in the clothes of a state claim, whether it is tort or otherwise, defeat federal jurisdiction. *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, et al.*, 390 U.S. 557, 560, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968); *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1, 24, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Allis-Chalmers Corp. v Lueck,* 471 U.S. 202, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206 (1985); *Leu v. Norfolk & Western Railroad Co.*, 820 F. 2d 825, 830 (7th Cir. 1987); *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1040 (7th Cir. 1987). When the existence of the collective bargaining agreement is established, the

claimant can no longer avoid the preemptive federal question. Hence, whether the federal preemption exists because of the peculiar force of Section 301 preemption, which is of such powerful force that federal jurisdiction attaches without the collective bargaining agreement being pleaded in the Complaint, or whether the artful pleading rule calls into existence federal preemption upon the admission of the existence of the collective bargaining agreement covering the sort of dispute which is the subject of state court claim, the state jurisdiction gives way in favor of federal jurisdiction.

D. Any Conflicts Among The Circuits On The Same Subject Matter Do Not Warrant A Grant Of Certiorari Here

Although a conflict exists among the Circuit Courts of Appeal as to whether Section 301 of the Labor Management Relations Act preempts state tort remedies labeled "retaliatory discharge" actions, such conflict does not provide sufficient basis for a second appeal in this case, because the factual context here overwhelmingly shows the Petitioner received full workers' compensation benefits; returned to work after the first injury; received two permanent partial disability awards, which he contended rendered him unable to perform his job duties, thus terminating his employment; was replaced by another union worker, and was seeking to have his employer create a non-existent "light duty" job. Certainly no Illinois workers' compensation statute requires an employer to create a non-existent job or to retain in his employment a person whose job related injury renders him permanently and partially disabled from doing his job. Hence, as a matter of law, there is not only no violation of 48 Ill. Rev. Stat. 1975, Sec. 138.4(h) and, therefore, no violation of any state public policy to allow an injured employee to pursue his full workers' compensation remedies, but, also, the circumstances make dramatically clear that any dispute or dissatisfaction Mr. Hanneken perceived, was one easily resolved by resort to the grievance and arbitration

mechanism of the collective bargaining agreement. In short, the case at bar, as a matter of law, does not present any conflict between state statutory policy and Section 301 of the Labor Management Relations Act, but presents solely a question under Section 301 involving only federal policy. There is no important reason warranting review here, even though the Circuits may differ on the preemptive effect of Section 301 when it collides with state policy in another contextual setting.

Specifically, the Circuit Courts of Appeal's decisions holding federal law preempts disputes arising out of employment contract termination, even though there may be a conflict with state policy, are: *Lingle v. Norge Division of Magic Chef*, 823 F.2d 1031 (7th Cir. 1987), en banc, and *Johnson v. Hussmann Corp.*, 805 F.2d 795 (8th Cir. 1986). In neither of these cases did the employees involved, according to the reports, receive any benefits or determinations involving physical inability to do their work. Similarly, the cases in conflict with *Lingle* and *Johnson*, i.e., *Baldracchi v. Pratt & Whitney Aircraft Division United Technologies Corporation*, 814 F.2d 102 (2nd Cir. 1987); *Herring v. Prince Macaroni of New Jersey, Inc.*, 799 F.2d 120 (3d Cir. 1968) and *Peabody Galion v. A.V. Dollar*, 666 F.2d 1309 (10th Cir. 1981) involve situations where the worker did not receive any benefits and there was no claim of permanent partial disability, when the terminations occured.

Indeed, *Herring* did not even discuss preemption of Section 301, but related only to New Jersey state law. Consequently, it is not in conflict with *Lingle* or *Johnson*, as to the effect of Section 301. *Peabody* was decided before this Court's opinion in *Allis-Chalmers*, supra, and to the extent it is in conflict with *Allis-Chalmers* must be deemed overruled. *Baldracchi* is in conflict with *Lingle* and *Johnson*; limits *Allis-Chalmers* to its factual context; but, as previously noted, involves a situation in which no benefits were provided or permanent disability present under the Connecticut Workers' Compensation Act there involved.

Even if there were no violation of the state public policy as a matter of law, but an evidentiary hearing were required, it is apparent here the state remedy is inextricably intertwined with the "just cause" discharge and dispute resolution mechanism of the collective bargaining agreement. The question involved would be the "justness" of the employee's job separation. Under the collective bargaining agreement the arbitration panel would have to decide whether the employee was separated because of his claimed physical inability to meet the job requirement to lift more than fifty pounds. Even if a state court jury trial were authorized for claimed "retaliatory discharge," a factfinder would have the same basic factual issues presented. The correctness of the Seventh Circuit's decision in the case at bar is so apparent and forceful, that there should be an end declared to litigation and the requested Writ of Certiorari positively denied.

In summary, the conflicting Circuit Courts of Appeal's decisions do not provide the basis for a review here, because on the face of the Complaint and admitted facts, there is no violation of the public policy of the State of Illinois, as expressed in the workers' compensation statute or as extended by state common law construction to create tort remedies. There being no violation of Illinois public policy as a matter of law, the only law that could apply to resolve any dispute is under the collective bargaining agreement, which the employee/petitioner has chosen to ignore. The conflicts of the Circuits over the preemptive effect of Section 301 when there is a collision with state policies do not apply here, where there is no conflict. The remedy of the collective bargaining agreement would require the same factual resolution as a state remedy, even if enforcement of the state public policy were involved. There is no compelling reason to review this case where the dispute is so clearly involved with the collective bargaining agreement's provisions. There are insufficient reasons for a second appeal through a grant of certiorari in this case.

BEST AV

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

John Dale Stobbs

Stobbs and Sinclair
500 Bond Street
P.O. Box 336
Alton, Illinois 62002
(618) 465-6978

Attorneys for Respondent

January 12, 1988

AILABLE COPY